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Patent Cases To Watch In The Second Half Of 2020

By **Dani Kass**

Law360 (July 9, 2020, 6:58 PM EDT) -- A wave of U.S. Supreme Court petition denials has made 2020 a bit of a letdown for patent attorneys, but there are several high-profile cases on the horizon that could decide the fate of Patent Trial and Appeal Board judges and biosimilars law, and offer more clarity on licensing standard essential patents.

While the high court dashed hopes that it would provide guidance on patent eligibility, the retroactive application of America Invents Act reviews and the PTAB overruling trial courts, there are still significant questions that the justices and other courts may be ready to tackle.

Here's a rundown of the cases that could have a big impact on the intellectual property world in 2020.

Arthrex v. Smith & Nephew

The top question on everyone's mind is whether the Supreme Court is going to address the Federal Circuit's explosive holding that PTAB judges were unconstitutionally appointed. Three petitions are pending in the fight between Arthrex Inc. and Smith & Nephew Inc. — one from each of the parties and one from the federal government.

What's at stake between the various petitions is whether the judges were properly appointed, and if not, whether the Federal Circuit's remedy to the issue — involving the removal of judges' employment protections — was sufficient. Arthrex is even arguing that the America Invents Act needs to be rewritten to deal with this constitutionality concern.

And while all of this is pending, the PTAB is sitting on more than 100 cases that were remanded under Arthrex, which are stayed until the Supreme Court acts.

"You've got this logjam where all these final written decisions from the PTAB are vacated and stayed pending what happens next," said McKool Smith PC principal Aimee Perilloux Fagan. "It's a perpetual big question mark."

The cases are Arthrex Inc. v. Smith & Nephew Inc. et al., case number 19-1458, Smith & Nephew Inc. et al. v. Arthrex Inc. et al., case number 19-1452, and United States v. Arthrex Inc., et al., case number 19-1434, all before the Supreme Court of the United States.

TCL v. Ericsson and Unwired Planet v. Huawei

Disputes over licensing standard essential patents are playing out around the world right now, but attorneys specifically have their eyes on a pair of U.S. Supreme Court and U.K. Supreme Court cases.

In Washington, TCL has asked the Supreme Court to overturn a Federal Circuit ruling allowing juries to decide royalty rates in SEP cases, rather than judges. TCL in part warned that the appeals court has allowed juries to decide damages outside of their authority, including for infringement of foreign patents, for products not made or sold in the U.S., and for products sold outside the statute of limitations, all of which would up the damages bill.

In the U.K., the top court is deciding whether it's appropriate for an English court to set global licensing rates for multinational patent portfolios.

Mintz Levin Cohn Ferris Glovsky and Popeo PC member Michael T. Renaud said such a ruling in the U.K. would provide "amazing efficiency for patent owners" and continue shifting SEP litigation away from the United States.

The cases are TCL Communication Technology Holdings Ltd. et al. v. Telefonaktiebolaget LM Ericsson et al., case number 19-1269, before the Supreme Court of the United States, and Unwired Planet International Ltd. v. Huawei Technologies (UK) Co. Ltd. and Huawei Technologies Co. Ltd. v. Conversant Wireless Licensing SARL, case numbers UKSC 2018/0214 and UKSC 2019/0041, in the Supreme Court of the United Kingdom.

American Axle v. Neapco

The Federal Circuit has been sitting on an en banc petition since November in a case where a panel invalidated a patent related to automobile driveshaft technology for claiming only a natural law. American Axle & Manufacturing's petition claims the court didn't say what the underlying natural law was, and that it dangerously altered patent eligibility standards.

The panel's 2-1 decision drew ire from the ranking member of the House Judiciary Committee, who called it "unthinkable" and proof that patent eligibility law needs to be updated, and former Federal Circuit Chief Judge Paul R. Michel, who said it puts "seemingly every patent [in] eligibility jeopardy."

The case is American Axle & Manufacturing Inc. v. Neapco Holdings LLC, case number 18-1763, in the U.S. Court of Appeals for the Federal Circuit.

California v. Texas

The Supreme Court is once again set to decide whether the Affordable Care Act is unconstitutional. Patent attorneys are watching because the Biologics Price Competition and Innovation Act, which created an abbreviated approval pathway for biosimilars, was passed under the health insurance law.

If the BPCIA falls, especially in what Venable LLP partner Ha Kung Wong called a "highly politicized war" over health insurance, it could render years of fighting over the law moot.

"It's like a civil war over this, but what's in the balance is not only health care but also this entire set of

case law we've been working on in the biologics field about how someone challenges patents," Wong said. "All that theoretically is going to go away. That would be a shame."

The cases are California et al. v. Texas et al., case number 19-840, and Texas et al. v. California et al., case number 19-1019, in the Supreme Court of the United States.

Amgen v. Sanofi

Amgen and Sanofi are fighting at the Federal Circuit about how narrowly inventors have to claim antibody-based inventions to meet enablement requirements. Amgen is calling for an entire genus to be claimed while research into those antibodies is ongoing, whereas Sanofi says inventors must narrow their patents to the specific antibodies that will be used, since a genus can include millions of antibodies.

"All of the newer drugs and the more effective drugs for cancer therapy and for other immuno-related diseases are antibody drugs, and so the question of how to claim these antibodies and the extent of how you claim these antibodies is significant," Sterne Kessler Goldstein & Fox PLLC director Chandrika Vira said.

Wong noted that this case is especially important during a pandemic that's relying on antibody research for a vaccine.

Bristol-Myers Squibb, Merck, Eli Lilly and Pfizer have all submitted amicus briefs, highlighting the focus big pharma is placing on the case.

The case is Amgen Inc. v. Sanofi, case number 20-1074, in the U.S. Court of Appeals for the Federal Circuit.

Others To Watch:

The Chamberlain Group v. Techtronic Industries
The Chamberlain Group Inc.'s Supreme Court petition accuses the Federal Circuit of picking patent claims apart to an unfair degree when deciding whether they're invalid as abstract, saying claims need to be viewed as a whole and not broken down to "a single supposed point of novelty." A U.S. Senator said the holding that claims of Chamberlain's garage door patent are abstract "demonstrates the madness in this area of law."

While the petition warns of a "patent emergency" and retired Federal Circuit Chief Judge Randall Rader has encouraged the justices to take up the case, Finnegan Henderson Farabow Garrett & Dunner LLP partner J. Michael Jakes said it's unlikely the justices will bite, after shooting down related cases this year that seemed like a sure bet.

Hologic v. Minerva
Minerva Surgical Inc.'s en banc petition asks the Federal Circuit to abolish a doctrine barring inventors who sell their patent rights from challenging the patent's validity in district court. Law professors supporting the company said the doctrine prevents inventors and those with ties to them from moving to invalidate bad patents, despite being in the best position to raise a challenge.

Dana-Farber v. Ono
The Federal Circuit is weighing where to draw the line between collaboration and significant

contributions in a case where a district court ordered two scientists to be named as co-inventors on six patents involved in Nobel Prize-winning cancer research.

Sterne Kessler's Vira noted that it's rare for inventorship disputes to end up at the Federal Circuit, so the case will likely impact how research agreements are written.

--Additional reporting by Dorothy Atkins, Britain Eakin and Bonnie Eslinger. Editing by Kelly Duncan.